

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD ROBERT BROKER and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI

*Docket No. 01-841; Submitted on the Record;
Issued November 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration was untimely filed and lacked clear evidence of error.

Appellant, a 37-year-old nurse, filed a notice of traumatic injury on March 26, 1992 alleging that he stuck himself with a needle after giving a patient a shot. He alleged that he developed hepatitis C as a result and filed a notice of recurrence of disability on October 16, 1997.

By decision dated January 9, 1998, the Office denied appellant's claim. Appellant, through his attorney, requested reconsideration on December 8, 1998. The Office denied modification of its January 9, 1998 decision on January 12, 1999. Appellant again requested reconsideration on August 22, 2000. By decision dated November 16, 2000, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that his request was untimely filed and lacked clear evidence of error.

The Board finds that the Office lacked within its discretion in refusing to reopen appellant's claim for consideration of the merits.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office through regulations has imposed limitations on the exercise of its

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

³ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

Appellant requested reconsideration on August 22, 2000. Since appellant filed his reconsideration request more than one year from the Office's January 12, 1999 merit decision, the Board finds that the request was untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁶ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹²

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹³ The Board must make an independent determination of whether a claimant has submitted clear

⁴ 20 C.F.R. § 10.607. The Board has concurred in the Office's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁵ *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

⁶ *Thankamma Mathews*, *supra* note 2 at 770.

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

⁸ *Thankamma Mathews*, *supra* note 2 at 770.

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Jesus D. Sanchez*, *supra* note 3 at 968.

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

The evidence submitted by appellant does not raise a substantial question on the correctness of the Office's most recent merit decision and is insufficiently probative to *prima facie* shift the weight of the evidence in favor of appellant's claim. The issue in the case is the causal relationship between appellant's diagnosed hepatitis C and the employment injury of a needle stick.

In support of reconsideration, appellant submitted a medical report dated January 17, 2000 from Dr. Gregory D. Harrington, an osteopath, who noted that appellant reported three possible exposures for hepatitis C, the needle stick in 1992, a bite from a patient in 1995 and a blood transfusion in 1980. Dr. Harrington opined that the needle stick was the most likely cause of the disease, but that the blood transfusion could not be ruled out. He added that there was no way to prove that appellant's employment-related needle stick resulted in his diagnosed condition because the employing establishment had not tested the patient in question for the disease.

This report does not provide a clear opinion on the causal relationship between appellant's condition and his employment and therefore is insufficient to raise a substantial question regarding the Office's most recent decision. The remainder of the evidence submitted is not relevant to the medical issue of whether appellant's diagnosed condition is related to his employment. Therefore, appellant has failed to establish clear evidence of error on the part of the Office.

The November 16, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 13, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁴ Gregory Griffin, *supra* note 4.